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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 414

BENJAMIN HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 197–199, 204) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 11, 1945 (R. 200), and a petition for rehearing (R. 201–202) was denied on August 14, 1945 (R. 204). The petition for a writ of certiorari was filed on September 10, 1945. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was sufficient independent evidence of the petitioner's connection with the conspiracy to justify admission against him of statements made by co-conspirators in furtherance of the conspiracy and whether the evidence is sufficient to support the verdict.

2. Whether it was proper to allow the prosecutor to impeach a government witness whose testimony differed materially from a signed statement given by him to investigators.

STATEMENT

Petitioner was convicted on the first, third, and fourth counts of a four-count indictment returned against him and others in the United States District Court for the Southern District of Georgia (R. 1–7, 8). The first count charged a conspiracy to violate the internal revenue laws relating to liquor (R. 1–5), and the third and fourth counts each charged the possession of a different unregistered still (R. 6–7). Petitioner was sentenced to imprisonment for two years on count one and six months on each of counts three and four, the sentences to run consecutively, and to pay a fine of $5,000 on count one, and $500 on each of

counts three and four (R. 9–10).[1] On appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 200). The evidence as to petitioner may be summarized as follows:

In January 1942, the defendants Davis, Parks, and Gaddis met in the home of Mr. and Mrs. Pirkle, who were named as co-conspirators but not indicted, near Augusta, Georgia, and discussed the setting up and operation of a still (R. 16–17, 31–32). Mr. Pirkle testified that Davis was to buy the whisky produced at the still at $1.25 per gallon, that Gaddis was to receive one-half of the profits and Pirkle and Parks a fourth each, and that petitioner was not mentioned in the discussion (R. 17, 24). Mrs. Pirkle, who was present and heard the conversation (R. 17, 32), testified that the arrangements were that Davis was to buy the liquor, and that petitioner, Pirkle, Parks, and Gaddis, were each to receive one-fourth of the profits (R. 32); that it was stated that petitioner could get sugar in Atlanta, and Parks could obtain it in Dahlonega (R. 32, 45).

A still was set up on a rented site in Burke County, Georgia (R. 17–18, 32, 33), and the Pirkles moved to a larger house in order that Gaddis and his wife might live with them (R. 18, 32). Sugar was delivered to the Pirkles' house

[1] Petitioner's sentence in case No. 301, this Term, is to run consecutively to the sentence imposed in the instant case.

and to the still by Gaddis and Parks and the defendants Perry and Roberts (R. 18, 19–20, 33, 34). Petitioner once called at the house with Parks looking for Gaddis (R. 40–41, 47).

On several occasions during the early part of 1942, petitioner, in the company of Perry and Roberts, purchased one to two thousand pounds of cane sugar at a time from a wholesale grocer in Atlanta. On some occasions petitioner paid for the sugar and the men with him loaded it on trucks. (R. 69, 74.) On February 19, 1942, petitioner purchased approximately ten thousand pounds of burnt sugar through another wholesale dealer in Atlanta (R. 71–72, 73–74).

On March 9, 1942, Roberts was arrested while driving a truckload of sugar (R. 20). Davis learned of the arrest and called "Ben" in Atlanta (R. 21; see also R. 37). When Roberts delivered the sugar at the Pirkles' house later that same day, he stated that petitioner had sent someone to get him out of jail (R. 21, 37). Petitioner, Perry, Gaddis, Davis, and Parks were frequently observed at a filling station in Atlanta, and Davis telephoned that station when Roberts was arrested (R. 115–116, 133). Late that night petitioner was observed at a filling station near Thomson, Georgia, and was later seen driving toward Augusta (R. 111, 126). The next day Roberts was arrested at the Thomson filling station driving a truck carrying non-tax-paid liquor

(R. 110, 126). On March 26, 1942, federal and state officers seized and destroyed the still (R. 19, 22, 34, 62, 112–113).

Thereafter, another still was set up in Jefferson County, Georgia (R. 22–23). On May 8, 1942, Perry, under the assumed name of Smith, bought a Chevrolet truck from a Mr. Carr (R. 48–49, 51). Petitioner accompanied Perry at the time of the purchase and drove the truck away (R. 49, 50). The first load of liquor taken from the still, driven by Roberts, was "hijacked" (R. 23, 34–35). The truck purchased by Perry was later found by state officers abandoned on the highway (R. 54). Subsequently Perry, still using the name of Smith, accompanied by petitioner, asked Carr for a duplicate bill of sale in order to enable him to repossess the truck (R. 50–51), and petitioner and Perry called for the truck from the person who had purchased it from the officers (R. 57, 58, 60). On May 21, Roberts was seen driving the truck to Pirkle's house (R. 63). On May 24, Roberts was arrested while driving another truck containing illicit whisky (R. 64, 129–130). The Jefferson County still was discovered the same day (R. 64, 65, 130; see R. 23, 34).

ARGUMENT

Petitioner attacks (Pet. 4, 5, 6, 7, 8) the sufficiency of the evidence to support his conviction, and the admissibility of Mrs. Pirkle's testimony that at the meeting in her home in January 1942

it was stated that petitioner was to have a one-fourth share in the profits; that Roberts had reported that petitioner had obtained his release from jail following his arrest on March 9, 1942; and that Parks had told her petitioner was suspicious of Roberts (R. 32, 35–38). Mrs. Pirkle's testimony in respect of the January meeting clearly related to declarations made by conspirators in furtherance of the conspiracy, and was, therefore, properly admitted against petitioner if there was independent proof connecting him with the conspiracy. *Glasser* v. *United States,* 315 U. S. 60, 73–74; *United States* v. *Compagna,* 146 F. 2d 524, 530 (C. C. A. 2), certiorari denied April 2, 1945, Nos. 935, 942, 946, October Term, 1944.[2] The other two declarations, although closely related to matters in execution of the conspiracy, were not so clearly in furtherance thereof. However, neither of such statements had the same probative force as the testimony concerning the initial arrangements for petitioner's share in the venture and, in view of the strength of the other evidence (see *infra*), we do not think the admission of Mrs. Pirkle's testimony can be

[2] See also *United States* v. *Manton,* 107 F. 2d 834, 848 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Marino* v. *United States,* 91 F. 2d 691, 696 (C. C. A. 9), certiorari denied *sub nom. Gullo* v. *United States,* 302 U. S. 764; *McDonald* v. *United States,* 89 F. 2d 128, 133 (C. C. A. 8); *Laska* v. *United States,* 82 F. 2d 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Baker* v. *United States,* 21 F. 2d 903, 905 (C. C. A. 4), certiorari denied, 276 U. S. 621.

deemed reversible error. Cf. *Delaney* v. *United States*, 263 U. S. 586, 590.

The evidence that petitioner had purchased large quantities of sugar, that at least some of that sugar was carried by Roberts and Perry, who were particularly closely associated with petitioner and who were regular haulers to and from the Pirkle house and the stills; that petitioner was in frequent association with others of the conspirators as well; that he accompanied Perry at the time of the purchase and repossession of the truck which was later observed at the Pirkles' house (see Statement, *supra* pp. 3–5), were independent circumstances sufficient to warrant the jury in concluding that petitioner was a member of the conspiracy. This evidence, together with the testimony concerning petitioner's share in the venture, was clearly sufficient to support the verdict.

2. Petitioner's objection to the prosecutor's impeachment of government witness Moore (Pet. 5, 7) is without substance. Moore was questioned as to sales of sugar in Dahlonega, Georgia, to petitioner's co-defendant Parks. Moore's testimony differed materially from a signed statement he had given to investigators, and the prosecutor was thereupon allowed to question him as to his prior statement (R. 75–96). The propriety of allowing the Government to impeach its own witness under such circumstances is well estab-

lished. *Hickory* v. *United States,* 151 U. S. 303, 309; *Walker* v. *United States,* 104 F. 2d 465, 470 (C. C. A. 4); *United States* v. *Graham,* 102 F. 2d 436, 441–442 (C. C. A. 2), certiorari denied, 307 U. S. 643. *Young* v. *United States,* 97 F. 2d 200 (C. C. A. 5), does not contradict this rule (cf. Pet. 7–8). Furthermore, as the court below pointed out (R. 198), petitioner is in no position to complain of the impeachment of Moore, for Moore's testimony in no way implicated him.

CONCLUSION

The decision below is correct, and the case presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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